IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 103

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE BALTIMORE AND OHIO RAILWAY COMPANY; ET AL.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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JURISDICTION.

The judgment of the Court of Appeals was entered January 17, 1957 (R. 212). Rehearing denied February 20, 1957 (R. 213). Petition for Writ of Certiorari filed in this Court invoked jurisdiction under 28 U. S. C. Sec. 1254 (1). Certiorari granted by order of this Court May 27, 1957 (R. 215).

CONSTITUTIONAL PROVISION, STATUTES AND ORDINANCE INVOLVED.

The statutes involved are Secs. 23-1, 23-10, 23-27, 23-51, 23-52, 23-81, 23-105 and 23-106 of the Revised Cities and Villages Act of Illinois (Ill. Rev. Stat. 1955, Chap. 24, Art. 23, pp. 581, 582, 584, 586, 589); printed in Appendix A, pp. 13, 14 of Petition for Writ of Certiorari.

The city ordinance involved is Chap. 28 of the Municipal Code of Chicago (R. 171-189), as amended by ordinance passed July 26, 1955 (Pl. Ex. B, R. 7, '44). Chap. 28, as amended is printed in Appendix A, pp. 14-36 of Petition for Writ of Certiorari, with the sections amended and added by ordinance of July 26, 1955, emphasized by italics.

The Court of Appeals relied upon the commerce clause of the U. S. Constitution, Art. I, Sec. 8, cl. 3, to declare the ordinance of July 26, 1955 invalid.

QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review are stated in detail on pages 2 and 3 of the petition for the writ of certiorari granted by this Court. The sum and substance thereof are as follows:

1. Should the courts below have passed on constitutional issues affecting the enforcement of a city ordinance

purporting to license and regulate the operation of motor vehicles for public hire only at railroad terminals and steamship docks, without an authoritative decision by the State courts that the ordinance is applicable to operations under contracts with railroads carrying passengers and their baggage *en route* in interstate travel under tariffs which include the privilege of transfer between terminals in the city.

2. Are the operations of Respondent, Railroad Transfer Service, Inc., in performance of transfer, collection or delivery service by motor vehicles within the terminal area in the city of Chicago, subject to license and regulation pursuant to the provisions of Chapter 28 of the Municipal Code of Chicago (Pl. Ex. B, R. 171), if Section 28-31.1 of said chapter, as amended by the ordinance of July 26, 1955 (Pl. Ex. B, R. 44, 45),[1] is inapplicable to said Respondent's operations.

STATEMENT OF THE CASE.

Respondent railroads (hereinafter referred to as Terminal Lines) and Railroad Transfer Service, Inc. (hereinafter referred to as Transfer) brought action in the District Court against Petitioner, City of Chicago (hereinafter referred to as the city) and certain executive and administrative officers of the city for declaratory judgment and injunction against the enforcement of Chapter 28 of the Municipal Code of Chicago, as amended by an ordinance passed July 26, 1955, commonly known as the "Public Passenger Vehicle Ordinance" (hereinafter referred to as the Ordinance).

The Ordinance purports to license and regulate the op-

1. Chapter 28 of the Municipal Code of Chicago, as amended July 26, 1955, is printed in Appendix A to Petition for Writ of Certiorari, page 14, *et seq.* The amendments of July 26, 1955 are emphasized by italics.

eration of motor vehicles on any public way for the transportation of passengers for hire from place to place within the corporate limits of the city, excepting motor vehicles devoted exclusively for funeral use or in operation of a metropolitan transit authority or public utility under the the laws of Illinois (Sec. 28-2).

The complaint asserts that the Ordinance does not apply to the operations of Transfer, pursuant to its agency contract (Pl. Ex. A, R. 25-42); and, if the Ordinance does apply to such operations, it is void as an attempt to regulate interstate commerce, in contravention of Art. I, Sec. 8, cl. 3 of the Constitution of the United States (R. 6, 7).

There are eight passenger terminals in the central business area of Chicago, each of which is used by some of Terminal Lines. None of Terminal Lines passes through Chicago. Railroad passengers travel through Chicago on through route tickets or coupons including transportation between terminals by motor vehicles of Transfer. Transfer began its operations on October 1, 1955, without a public passenger vehicle license and without applying for such license under the provisions of the Ordinance.

Before July 26, 1955, when Chapter 28 of the Municipal Code of Chicago was amended, Parmelee Transportation Company, a Delaware corporation (hereinafter referred to as Parmelee), operated terminal vehicles for public hire from railroad terminal stations and steamship docks to any destination within the central business area of Chicago, including transfer of passengers and their baggage between railroad terminals on through route railroad tickets or coupons. At that time, "Terminal vehicle" was defined as "a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations" (Pl. Ex. B, R. 172). Parmelee having been advised that its agency or contractual arrangement with

Terminal Lines was about to be terminated, and concerned that its investment in property and revenue would thereby be jeopardized, obtained from the city council amendments to Chapter 28 on July 26, 1955 (hereinafter referred to as the 1955 ordinance) to permit it to continue its operation without contractual arrangement with any carrier (Pl. Ex. B, R. 44, 45; Pl. Ex. 4, R. 90-92).

By virtue of the 1955 ordinance Parmelee service became available for public hire at railroad and steamship docks for local transportation, upon payment of cash fares, to destinations in the central business area of the city. Parmelee is the only licensee for such operation; and no more such licenses can be issued to anyone without council authority after a hearing to determine the public convenience and necessity for such additional service (Sec. 28-31.1, Pl. Ex. B, R. 44, 45).

Parmelee was permitted to intervene as party defendant to assert its claim that the operations by Transfer, without license or regulation under the Ordinance, have substantially and unfairly affected Parmelee's business, have inflicted incalculable losses of revenue and profits, have resulted in serious injury to Parmelee's good will and have severely hampered, impeded and obstructed Parmelee in its attempt to render adequate and lawful public passenger terminal services (R. 57, 60, 68). Parmelee asked the District Court to consider its intervening petition as an answer to the complaint, that the court declare the operations by Transfer are within the purview of the Ordinance and that Transfer be restrained from operating upon the streets and public places of the city without terminal vehicle licenses (R. 60, 51).

The city then filed a motion for summary declaratory judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to determine whether Transfer's opera-

tions are subject to license and regulation under the Ordinance (R. 71).[2]

The District Court permitted the city to file its motion (R. 73); and the case was argued by counsel for Terminal Lines and Transfer, and Parmelee as the adversary. The court found that Transfer's vehicles are "terminal vehicles" as defined in Section 28-1, and are subject to the provisions and regulations of Chapter 28 of the Municipal Code of Chicago, as amended, applicable thereto (R. 115).

On appeal, the case was argued for the city and Parmelee by counsel for Parmelee, the corporation counsel of the city appearing with him on the brief. The Court of Appeals did not consider the question whether the Ordinance is applicable to Transfer's operations. The Court reversed and remanded the judgment of the District Court, after concluding that Section 28-31.1 of the 1955 ordinance limited the number of terminal vehicle licenses to those held by Parmelee on July 26, 1955, and therefore is invalid (240 F. 2d 939).

2. Seven special interrogatories based on provisions of the Ordinance affecting the ultimate issue were submitted by the city's motion. They are set forth in the Petition for Writ of Certiorari pp. 4, 5, for convenience of this Court.

SUMMARY ARGUMENT.

1. Section 28-31.1 of the Ordinance did not grant to Parmelee a monopoly of the use of city streets for transfer of passengers by motor vehicles between railroad terminals, since the number of terminal vehicle licenses and the rights of licensees are subject to the control of the city under its police power.

2. The courts below were in error in assuming that Section 28-31.1 of the Ordinance applies to terminal vehicles under contract with railroads for transfer of their passengers in interstate commerce between railroad terminals in Chicago on through route tickets or coupons, including such transfer privilege.

3. The courts below should not have undertaken to adjudicate a controversy concerning the proper construction of a city licensing ordinance until efforts to obtain licenses and an appropriate adjudication in the State courts have been exhausted.

4. The Court of Appeals erred in considering statements of the chairman of the local transportation committee of the city council and alleged statements of counsel for the city to determine the intent of the city council in passing the Ordinance.

5. The Court of Appeals ignored the uniform and long established policy of the federal courts not to pass on constitutional questions if the record presents some other ground upon which the case may be decided, or in cases where the underlying issue involves the construction of a State statute or city ordinance.

ARGUMENT.

I.

The intention of the city council in enactment of an ordinance must be determined from the language used and not from statements of the author of the ordinance or by members of the council.

The Court of Appeals laid great stress upon meetings of the committee on local transportation of the city council, held on June 21 and 26, 1955, to show the intent of the chairman of the committee and his motive in the preparation of an ordinance granting an exclusive franchise to Parmelee for 10 years "for the operation of terminal vevehicles to transfer passengers and their baggage between railroad stations", to which counsel for the city was said to have objected because it was not in proper form; and further that said counsel "had prepared a substitute ordinance which would accomplish what the committee had in mind, namely, placing the licensing and operation of terminal vehicles under the complete control of the City of Chicago." (240 F. 2d 935.)

The Court of Appeals was in error, *first* as to the nature of the proposed franchise ordinance; *second*, as to the nature of the objection to said proposed ordinance by counsel; and *third*, as to the meaning and purpose of the substitute ordinance.

The first error appears in the definition of "Terminal vehicle" in the proposed franchise ordinance which clearly indicates that it was not for operation "to transfer passengers and their baggage *between* railroad stations," as stated by the Court of Appeals (240 F. 2d 935), but was "for the transfer of passengers *to* and *from* ter-

minal stations of railroad and steamship companies." (Pl. Ex. 3, R. 85.)

The second error was that counsel for the city did not state that he objected to the *form* of the proposed franchise ordinance, but he questioned the *corporate power* of the city to enact such ordinance (R. 91).

The third error was that counsel for the city stated quite clearly that terminal vehicles as defined (before the 1955 ordinance) did not embrace those vehicles that operated *between* railroad stations. "The operation [was] from the railroad stations to points within the central business district. It is in the railroad terminal area, but it isn't necessarily between railroad stations. It may go from railroad stations to hotels and from hotels to railroad stations. That is the operation. And that operation can be continued by amendments to the present ordinance without conflicting with any of the statutory provisions" (R. 92).

The statements of the chairman cannot be ascribed to counsel for the city and the chairman's motives in submitting for consideration of the city council a proposed ordinance or ordinances certainly cannot be ascribed to the city council in the passage of an ordinance.

The Court of Appeals evidently stated the facts which occurred at the meetings of June 21 and 26, 1955, from the minutes of the committee on local transportation (Pl. Ex. 5, 6, R. 93, 94, 95), disregarding a verified transcript of the colloquy between the chairman and members of the committee and counsel for the city (Pl. Ex. 4, R. 92). It is not shown anywhere in the record that minutes of a committee of the city council recorded by a clerk acting as secretary of the committee, which includes matter other than official action, such as a motion made by a member thereof and a vote thereon, is an official record

of statements made by members of the committee and other persons interested in its proceedings, especially when there is a transcript of shorthand notes taken by a court reporter containing a verbatim report of conversations which impeach the so-called minutes transcribed by the committee's secretary.

The People v. *Chicago Rys. Co.*, 270 Ill. 87; 110 N. E. 386 (1915), involved the construction of a city ordinance which granted to defendant's predecessors the right to maintain and operate street railways upon certain streets and established a 5-cent fare with transfer privileges between the railway lines east and west of the city limits of Chicago. New matter was set forth in a replication alleging that the city council passed an ordinance reported to the council by the local transportation committee which was in all respects identical with an ordinance set up in a plea theretofore filed, with an additional clause in Section 8 that it was not intended by said section to change, add to, or detract from earlier ordinances, except as therein and thereby provided; that thereupon counsel concerned in this case on behalf of the petitioner saw the mayor and various members of the committee on local transportation regarding said ordinance and the mayor addressed a communication to said counsel, stating that the corporation counsel did not agree with his contention and did not regard the insertion of the clause as finally settling the controversy.

The Court said:

> "We have held that the rules for the construction of an ordinance are the same as those applied in the construction of a statute. (*People* v. *Hummel*, 215 Ill. 43; *People* v. *Mohr*, 252 id. 160.) It is a primary rule in the interpretation and construction of a statute that the intention of the legislature is to be ascertained and given effect. (*People* v. *Price*, 257 Ill. 587.) This rule does not, however, permit the courts

to consider statements made by the author of a bill or by those interested in its passage, or by members of the legislature adopting the bill, showing the meaning or effect of the language used in the bill as understood by the person or persons making such statements. * * *

* * * "A further reason exists why these matters cannot be considered by the courts in construing that section. The ordinance was passed by the city council,—not by the local transportation committee,—and it does not appear from the replication that any of the correspondence referred to or any of the statements made at the meeting of the committee on local transportation were brought to the attention of the city council when the proposed ordinance of March 18, 1913, was submitted to the council. It is the intention of the city council which the courts must endeavor to determine,—not the intention of the members of some committee having the proposed ordinance before them for consideration before it was presented to the council. So far as this record discloses, the courts, in construing said section 8, are limited to the language used in the section, considered in connection with the situation existing between the Chicago Railways Company, the village of Oak Park and the city of Chicago at the time the ordinance was passed, which situation was fully disclosed by the petition and plea." (270 Ill. 105, 107.)

In *People Ex Rel. Brenza* v. *Gebbie*, 5 Ill. 2d 565; 126 N. E. 2d 587 (1955), the Supreme Court of Illinois cited the foregoing case with approval and referred to other cases of similar import, as follows:

"* * * In the early case of *Belleville and Illinois-town Railroad Co.* v. *Gregory*, 15 Ill. 20, this court adopted the rule that the meaning or effect of a statute cannot be determined by considering the statements and opinions of persons interested in its passage. This rule was reiterated in *People ex rel. Dwight* v. *Chicago Railways Co.*, 270 Ill. 87, at page 106, where it is said: 'When the courts shall be driven to the

lobbies of the legislature to learn the sentiments of the members, for the purpose of construing the laws, a new rule of construction will have been adopted.' Of like effect is *Eddy* v. *Morgan*, 216 Ill. 437, pp. 448-449." (5 Ill. 2d 577.)

The Corporation Counsel, in behalf of the city, filed a separate petition for rehearing requesting modification of the opinion of the Court of Appeals by deletion of the subject matter preceding the passage of the 1955 ordinance, or by modifying same in accordance with the facts. The petition for rehearing, among other documents and briefs, was designated by Respondents' counsel to be included in the transcript of record certified to this Court by the Court of Appeals. Reference is here made to quotations from the said petition in the Appendix to this brief. The petition for rehearing was denied (R. 213).

II.

The city has power to license and regulate the use of city streets for transportation of passengers for hire, even though interstate commerce is affected thereby, without placing an unreasonable burden thereon.

It is conceded by all parties in interest in this case and in the opinions of the courts below that, in the absence of unequivocal preemption by the federal government, the city has power and the right to license and regulate the use of city streets for transportation of passengers, even though interstate commerce is affected thereby. *Atchison Topeka & Santa Fe Railway Co.* v. *City of Chicago*, 240 F. 2d 930, 936, 940 (1957). *Sprout* v. *South Bend*, 277 U. S. 163; 72 L. ed. 833 (1927). *Cities Serv. G. Co.* v. *Peerless O. & G. Co.*, 340 U. S. 179, 186; 95 L. ed. 190, 202 (1950) and cases therein cited.

In the case last cited this Court said:

> "The Commerce Clause gives to the Congress a power over interstate commerce which is both paramount and broad in scope. But due regard for state legislative functions has long required that this power be treated as not exclusive. *Cooley* v. *Port Wardens*, (U. S.) 12 How. 299, 13 L. ed. 996 (1851). It is now well-settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce. *Parker* v. *Brown*, 317 U. S. 341, 87 L. ed. 315, 63 S. Ct. 307 (1943); *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, 83 L. ed. 752, 59 S. Ct. 528 (1939); *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 82 L. ed. 734, 58 S. Ct. 510 (1938). The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions. Nor should we lightly translate the quiescence of federal power into an affirmation that the national interest lies in complete freedom from regulation. *South Carolina Highway Dept.* v. *Barnwell Bros.*, (U. S.) *supra*. Compare *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128 (1890), decided prior to the Wilson Act [Aug. 8, 1890], 26 Stat. 313, ch. 728, with *Re Rahrer (Wilkerson* v. *Rahrer)*, 140 U. S. 545, 35 L. ed. 572, 11 S. Ct. 865 (1891), decided thereafter."

The decision of the Court of Appeals rested upon its construction of Section 28-31.1 of the 1955 ordinance, which, the court said, "would in effect limit the number of terminal vehicle licenses to those held by Parmelee on July 26, 1955 and give Parmelee perpetual control thereof, constitute a designation of Parmelee by the council of the city, in lieu of Transfer, the instrumentality selected by the Terminal Lines, rather than an exercise of the city's police power over traffic." (240 F. 2d 939).

The Court of Appeals gave no consideration to the difference between the operations by Parmelee and the operations by Transfer, affecting interstate commerce. The difference between these operations is that Parmelee undertakes to carry travelers and other persons who come into a terminal station for transportation to another terminal or to any other destination within the central business area of the city, as directed by its passengers, independently of any railroad or steamship journey, whereas, Transfer under contract with Terminal Lines is limited to the transportation of railroad passengers *en route* between terminals within the city, pursuant to through route tickets, upon payment of fares which include Transfer service. The two operations are clearly distinguishable. *Sprout* v. *South Bend*, 277 U. S. 163, 168; 72 L. ed. 833, 836 (1927).

In *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1946), involving a complaint for violation of the Sherman Anti-Trust Act; this Court distinguished the local operations of taxicabs and the operation of Parmelee terminal vehicles under contracts with railroad and steamship companies as defined in section 28-1 of the Public Passenger Vehicle Ordinance before it was amended by the ordinance of 1955. Under the ordinance of 1955 Parmelee operations are of the same character as taxicabs, affecting interstate commerce, while Transfer has taken the place of Parmelee in its operations under contract with Terminal Lines.

This Court said (332 U. S. 228):

> "* * *The complaint points out the well-known fact that Chicago is the terminus of a large number of railroads engaged in interstate passenger traffic and that a great majority of the persons making interstate railroad trips which carry them through Chicago must disembark from a train at one railroad station, travel from that station to another some two blocks to two miles distant, and board another train at the latter station. The railroads often contract with the passen-

gers to supply between-station transportation in Chicago. Parmelee then contracts with the railroads and the railroad terminal associations to provide this transportation by special cabs carrying seven to ten passengers. Parmelee's contracts are exclusive in nature.

"The transportation of such passengers and their luggage between stations in Chicago is clearly a part of the stream of interstate commerce. When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character. *The Daniel Ball*, 10 Wall. 557, 565. That portion must be viewed in its relation to the entire journey rather than in isolation. So viewed, it is an integral step in the interstate movement. See *Stafford* v. *Wallace*, 258 U. S. 495."

and on pages 230-232 this Court described the local character of transportation to and from railroad stations contracted for by travelers independently of the railroad journey.

Beginning at page 230,

"Many persons are said to embark upon interstate journeys from their homes, offices and hotels in Chicago by using taxicabs to transport themselves and their luggage to railroad stations in Chicago. Conversely, in making journeys from other states to homes, offices and hotels in Chicago, many persons are said to complete such trips by using taxicabs to transport themselves and their luggage from railroad stations in Chicago to said homes, offices and hotels. Such transportation of persons and their luggage is intermingled with the admittedly local operations of the Chicago taxicabs. * * * *"

"But interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. *Swift & Co.* v. *United States*, 196 U. S. 375, 398; *North American Co.* v. *S. E. C.*, 327 U. S. 686,

705. And interstate journeys are to be measured by 'the commonly accepted sense of the transportation concept.' *United States* v. *Capital Transit Co.*, 325 U. S. 357, 363. Moreover, what may fairly be said to be the limits of an interstate shipment of goods and chattels may not necessarily be the commonly accepted limits of an individual's interstate journey. We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations.

"Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination. What happens prior or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the interstate movement. The traveler has complete freedom to arrive at or leave the station by taxicab, trolley, bus, subway, elevated train, private automobile, his own two legs, or various other means of conveyance. Taxicab service is thus but one of many that may be used. It is contracted for independently of the railroad journey and may be utilized whenever the traveler so desires. From the standpoints of time and continuity, the taxicab trip may be quite distinct and separate from the interstate journey. To the taxicab driver, it is just another local fare."

The Court of Appeals ignored the fact that the ordinance of 1955 was an integral whole. It construed Section 28-31.1 of said ordinance, which restricts the number of licenses for terminal vehicles to public convenience and necessity, in isolation rather than in its relation to other sections of the 1955 ordinance. Said ordinance amended the definition of "Terminal vehicle" by divorcing the operation of such vehicle from railroad and steamship carriers, and amended Section 28-31 by limiting the hire of such terminal vehicles from railroad terminal stations and steamship

docks. It added section 28-31.1, which governs the licensing of *terminal vehicles as defined by the 1955 ordinance*, and concededly applies to Parmelee operations without contractual arrangement with any railroad or steamship company. It also added Section 28-31.2 regulating the rate of fare of such terminal vehicles *for local transportation of passengers*. Section 28-31.1 does not grant to Parmelee any monopoly and is a valid exercise of the police power of the city in the regulation of local transportation, under Illinois law, "since the number of licenses and the rights of licensees are subject to the control of the city." *People ex rel. Johns v. Thompson*, 341 Ill. 166; 173 N. E. 137 (1930); *Yellow Cab Co. v. City of Chicago*, 396 Ill. 388; 71 N. E. 2nd 652 (1947); *United States v. Yellow Cab Co.*, 332 U. S. 218, 224; 91 L. ed. 2010, 2016 (1946).

Granted that Section 28-31.1 is valid, if limited to local transportation operations of terminal vehicles as defined in the 1955 ordinance, there is still the question whether Transfer is subject to license and regulation as a public passenger vehicle, within the meaning of the Ordinance. That question was submitted to the courts below by the city's motion for summary declaratory judgment (R. 71).

III.

The question of the validity of section 28-31.1 of the Ordinance was not subject to decision or consideration by the federal courts.

The validity of section 28-31.1 of the Ordinance cannot be drawn in question until the State courts by authoritative decision should hold that Transfer operations are subject to license and regulation as public passenger vehicles, within the terms of the Ordinance, and specifically that they come within the class of public passenger vehicles defined as "Terminal vehicles" to which section 28-31.1

is explicitly applicable, or at least until Transfer has made application for licenses and is refused because Parmelee's service is adequate and sufficient to satisfy public convenience and necessity.

It is clearly the duty of the Supreme Court to ascertain from the record whether the courts below had jurisdiction, though that question was not raised by counsel in the District Court or the Court of Appeals. *M. C. & L. Ry. Co.* v. *Swan*, 111 U. S. 379, 382 (1884); *Shanferoke C. & S. Corp.* v. *Westchester S. Corp.*, 293 U. S. 449; 79 L. ed. 583, 586 (1935); *Clark* v. *Paul Gray*, 306 U. S. 583; 83 L. ed. 1001 (1939).

The policy of this court in avoiding or postponing consideration of constitutional questions in advance of necessity has not been limited to jurisdictional determinations. *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 91 L. ed. 1666, 1678 (1947); *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 86 L. ed. 1355 (1941).

In *Government & C. E. O. C., CIO* v. *Windsor*, 353 U. S. 364; 1 L. ed. 2d 894 (1957), an action was brought in the District Court to restrain the enforcement of a State statute on constitutional grounds. The court withheld the exercise of its jurisdiction to permit the exhaustion of such State administrative and judicial remedies as may be available. Appellant Union then commenced an action in the Alabama court to obtain an authoritative construction of the State statute prohibiting any public employee to join or participate in labor union or labor organization under penalty of forfeiture of the right to his public employment. In its complaint the Union denied that the statute applied to it or its members. None of the constitutional contentions presented in the Federal court were advanced in the State court action. The Alabama Supreme Court held that a local union operating under its rules and constitution would be subject to the provisions of the Act. This Court said (1 L. ed. 2d 896):

"The bare adjudication by the Alabama Supreme Court that the union is subject to this Act does not suffice, since that court was not asked to interpret the statute in light of the constitutional objections presented to the District Court. If appellants' freedom of expression and equal protection arguments had been presented to the state court, it might have construed the statute in a different manner. Accordingly, the judgment of the District Court is vacated, and this cause is remanded to it with directions to retain jurisdiction until efforts to obtain an appropriate adjudication in the state courts have been exhausted."

To comply with the last opinion of this Court upon this subject, the construction of Section 28-31.1 of the 1955 ordinance must be adjudicated by the Illinois courts, in the light of the constitutional objection that if said section is applicable to Transfer it would violate the commerce clause of the constitution. Objection by Respondents to the city's right to take a different position before this Court from that in the Court of Appeals, even if true, does not affect the right of this Court to vacate, reverse or otherwise nullify the judgments of the lower courts on jurisdictional grounds or in pursuance of the established policy of the federal courts to avoid or postpone constitutional questions in advance of necessity.

City and County of Denver v. *Denver Tramway Corp.*, 23 Fed. 2d 287 (cert. den. 278 U. S. 616) cited by Respondents for denial of the city's right to take a different position before this Court in certiorari from that in the Court of Appeals, was an appeal from the U. S. District Court enjoining enforcement of an ordinance fixing rates of fare which were alleged to be confiscatory and violative of the Federal Constitution. Federal jurisdiction was based upon diversity of citizenship. The City raised the question that the court below was without jurisdiction. The Company contended that the question of jurisdiction was passed upon

adversely to the City upon a former appeal to the United States Supreme Court which had reversed the case on another point, but sustained it as to the question of jurisdiction (p. 294).

In the case here, the question of propriety of deciding a constitutional question without necessity or before a decision of the underlying question of construction of a city ordinance governed by State law first arose by the decision of the Court of Appeals which has been brought to this Court by certiorari.

C. St. P. M. & O. Ry. Co. v. *United States*, 322 U. S. 1 (1943), cited by Respondents in support of their claim that it is too late for petitioner to raise the question whether the lower courts should have remitted the issue on the construction of the ordinance to the Illinois courts because petitioner made no such suggestion in its Petition for Rehearing, involved the propriety of an order of the Interstate Commerce Commission granting operating authority to a motor carrier of goods in interstate commerce, upon condition that service between points in Minnesota established by the motor carrier under "grandfather rights" be continued, after finding that such service was required by the public convenience and necessity, although the carrier had withdrawn request for authority to continue such service. This case is inapposite to any question involved in the case before the court.

However, the city has not changed its position at any stage of the litigation. Action was brought by Respondents in the District Court for declaratory judgment, as a test case, to determine whether Transfer is required to secure city licenses for its operations,[3] and to enjoin the city from

3. See Appendix B, p. 25a, to Separate Brief of Transfer, filed in the Court of Appeals and certified to this Court, for argument of counsel for Transfer before the District Court as to agreement between Respondents and the city for test case. Excerpts from said argument are included in the Appendix to this brief.

interfering with said operations. Parmelee filed its petition to intervene as a party in interest to restrain Transfer's competitive operations without license, and the petition for intervention was granted and accepted as an answer to Respondent's complaint. The issues were joined between Transfer and Parmelee before the city filed any pleading. The city stood by in the contest between Transfer and Parmelee and filed a motion for summary declaratory judgment upon the undisputed material facts and issues of law, submitting to the Court special interrogatories pertaining to declaratory judgment in the case. The issue submitted to the District Court by the city's motion was confined to the construction of the ordinance concerning which there was a controversy between Parmelee and Respondents. The city's position was that the case did not involve any constitutional question. The District Court rendered judgment that Transfer is subject to license and regulation by the terms of the Ordinance. Respondents appealed and the case was argued in the Court of Appeals by the attorney for Parmelee; the Corporation Counsel appearing with him on the brief. The city's position on the motion for summary declaratory judgment, confined to the construction or meaning of the Ordinance, remained unchanged in the Court of Appeals. The decision that Section 28-31.1 of the 1955 ordinance is unconstitutional because it grants a monopoly to Parmelee was rendered by the Court of Appeals for the first time on the unwarranted assumption that said section imposed an unreasonable burden upon Transfer's business in interstate commerce.

This Court has consistently held to the practice of not passing on constitutional questions if the record presents some other ground upon which the case may be decided; or in situations where an authoritative interpretation of State law may avoid the constitutional issues.

Doud v. *Hodge*, 350 U. S. 485 (1955), cited by Respondents' attorneys in opposition to petition for certiorari (p. 8) was an action to enjoin enforcement of the Community Exchange Act of Illinois which required *Doud et al.* to obtain licenses and to submit to regulation of their business of selling and issuing money orders in the State, while the American Express Company, engaged in identical business activity in Illinois, was excepted from the operation of the Act. Jurisdiction was asserted under 28 U. S. C. Sec. 1331, on the ground that the Act denied them equal protection of the laws in violation of Sec. 1 of the Fourteenth Amendment to the Federal Constitution. The suit was tried before a three-judge District Court. There was no underlying issue upon the construction of the State law. The issue related to the validity of the discrimination.

Propper v. *Clark*, 337 U. S. 472 (1948), cited in said Respondents' brief, involved an action under the Trading with the Enemy Act, instituted by the Alien Property Custodian to obtain payment and a declaration of title in him against a receiver appointed by a State court. The Trading with the Enemy Act was federal legislation founded on Federal constitutional provisions, and this Court held that the power to enact carries with it final authority to declare the meaning of the legislation (337 U. S. 484). The question of the effect of the appointment of a temporary receiver by the State court on an Executive Order freezing the assets of an alien association before issue of the Executive Order was a subsidiary issue in the case. This Court distinguished the case from *Spector Motor*, *Fieldcrest*, *Pullman*, and other cases where the underlying issue was one of State law, to avoid an interpretation of the Federal Constitution (337 U. S. 490).

Conclusion.

The judgment of the Court of Appeals should be reversed and remanded with directions to expunge from the record the recital of the proceedings before the local transportation committee, and to remand the cause to the District Court with directions to vacate the judgment of said court and to retain jurisdiction until efforts to obtain an appropriate adjudication in the State courts have been exhausted.

Respectfully submitted,

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(p. 24 to the end)

APPENDIX.

Excerpts from pages 2 and 3 of petition for rehearing in the United States Court of Appeals filed by City of Chicago.

"The colloquy at the meetings of the city council committee on local transportation upon the subject of a proposed ordinance affecting operation of 'terminal vehicles' under license and regulation by the city has been misapprehended by the court, to imply that a substitute ordinance prepared by Mr. Grossman was a subterfuge to prohibit or interfere with the Terminal Lines in selecting any motor vehicle operator, other than Parmelee, to transfer passengers and their baggage in interstate commerce between railroad terminals.

"Plaintiff's Exhibit No. 4 (R. 90-92) which purports to be an excerpt from the proceedings before the local transportation committee does not justify the intent ascribed by the court to Mr. Grossman in the preparation of a substitute ordinance for the chairman's proposed ordinance which would have granted an exclusive franchise for 10 years to Parmelee for the operation of motor vehicles to transfer passengers and their baggage between railroad stations. Such construction of purpose and intent implies, if it does not charge, conduct derogatory to the reputation of a member of the bar of Illinois and of this court.

"The court's attention is directed to Mr. Grossman's specific answers to questions by the aldermen on page 92 of the record, which clearly show that a 'terminal vehicle,' as defined in Section 28-1 of the amended ordinance (R. 41), does not embrace vehicles that are limited to operation between railroad stations.

The court has been misled by the continued use of 'terminal vehicle' which originally was descriptive of a railroad and steamship passenger transfer vehicle. All that was claimed by the amended ordinance was to permit Parmelee to continue its operations as a local carrier of passengers, without identification as railroad or steamship passengers, for cash fares regulated by Section 28-31.2 of the ordinance (Exhibit B, complaint, R. 45).

"The plain and unequivocal purpose of the ordinance of July 26, 1955, was to permit Parmelee to continue its operation within a defined territorial zone, subject to regulation with other local public passenger vehicles, such as taxicabs, liveries and sight-seeing vehicles. The ordinance does not purport, and cannot be construed, to preclude any railroad or steamship company from providing motor vehicles for the transfer of its passengers between terminal stations in the city upon through route tickets, subject to local regulation as may be lawfully imposed without conflict with federal authority.

"We respectfully suggest that recital of the proceedings before the local transportation committee does not appear to be essential to the judgment of this court."

Excerpts from Appendix B, p. 25a, to brief and argument for Transfer in the United States Court of Appeals, designated by Respondent's counsel to be included in the transcript of record certified to this Court by the Court of Appeals.

"Mr. Goldsmith: * * * What we did, in order that there would be no question about a conflict between the City, we eliminated those two services and the contract so states, and the complaint so states. We have been performing that.

The Court: Does the corporation counsel disagree with you on your interpretation?

Mr. Goldstein: No. The truth of the matter is that on September 30, I was informed by the corporation counsel's office that it did not violate.

Since then there has been, for one reason or another, the question has—there has been pressure brought to litigate it to get a final determination of it.

The Court: Well now, you say they are threatening to arrest the drivers?

Mr. Goldstein: Yes, sir. They have indicated, as Mr. Crawford said, that rather than arrest the drivers and try it that way, they suggested we initiate the suit in the Federal Court so that a final determination could be made of the issue.

The Court: Well, I think you are entitled to a temporary restraining order."